PD-1199-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/29/2019 5:14 PM
Accepted 7/1/2019 10:11 AM
DEANA WILLIAMSON
CLERK

No. PD-1199-18

IN THE TEXAS COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/1/2019
DEANA WILLIAMSON, CLERK

OBINNA EBIKAM, Appellant

v.

THE STATE OF TEXAS

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DECISION BY THE FOURTH COURT OF APPEALS IN CAUSE NO. 04-18-00215-CR

APPELLANT'S REPLY BRIEF

Richard E. Wetzel
State Bar No. 21236300

1411 West Avenue, Suite 100
Austin, Texas 78701

(512) 469-7943 - phone
(512) 474-5594 – facsimile
wetzel_law@1411west.com

Attorney for Appellant
Obinna Ebikam

ORAL ARGUMENT REQUESTED

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Statement of the Case

Obinna Ebikam timely filed his opening brief. A brief filed by the Criminal District Attorney of Bexar County was struck due to a conflict of interest. The State Prosecuting Attorney (SPA) timely filed a brief. Ebikam, with leave of the court pursuant to TEX. R. APP. P. 70.4, now files his reply to the SPA's brief.

Question Presented for Review

Whether a defendant's failure to admit the exact manner and means of an assault as set forth in a charging instrument is a sufficient basis to deny a jury charge on self-defense.

I. The opinion of the court of appeals is what it is.

At the outset, the State claims the question for review is not implicated by the opinion from the court of appeals (SPA's brief at 4). Ebikam disagrees. In rejecting an entitlement to a charge on self-defense, the court of appeals noted its strict adherence to its own rule requiring a defendant to admit the offense as alleged in the charging instrument before a defensive issue need be included in the charge to the jury. *Ebikam v. State*, 04-18-00215-CR, slip op. at 3-4 (Tex. App.—San Antonio 2018, pet. granted). Ultimately, the court of appeals affirmed upon finding Ebikam was not entitled to a charge on self-defense because he never admitted striking the complainant with his hand as alleged in the information.

Ebikam, slip op. at 4. The question for review flows from the opinion by the court of appeals and had it not; it is presumed the petition would have been relegated to the *Degrate* trash heap. *See Degrate v. State*, 712 S.W.2d 755, 756 (Tex. Crim. App. 1986) (finding that petition which does not challenge the decision of the court of appeals is subject to summary refusal).

The State further argues the court of appeals reached the correct result under pre-*Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017) jurisprudence (SPA's brief at 6). Ebikam simply responds the court of appeals was not at liberty to ignore controlling and relevant case law from this court when considering the point of error presented on appeal.

Finally, the State contends no charge on self-defense was warranted based on the evidence presented at trial (SPA's brief at 6-7). The argument is flawed because it is based on viewing the evidence in the light least favorable to the requested charge. The correct standard requires viewing the evidence in the light most favorable to the defendant's requested submission. *See Gamino,* 537 S.W.3d at 510. An instruction is warranted if there is some evidence, from any source, when viewed in the light most favorable to the defendant, that will support the elements of self-defense. *Id.* Ebikam continues to maintain that under the correct standard of review, he was entitled to a charge on self-defense at trial.

II. *Gamino* is no outlier.

In what can only be described as a broad-based out of time motion for rehearing, the State invites the court to revisit and revise its recent decision in *Gamino* (SPA's brief at 7-19). It argues the opinion undermines the law of confession and avoidance which requires a defendant to admit all elements of the offense and offer evidence of a justification (SPA's brief at 19).[1]

The issue is not as simple as the State asserts. In its historical journey through the law of confession and avoidance, the State never acknowledges the standard of review for determining whether the evidence supports a justification charge such as self-defense. Even the dissent in *Gamino* observed:

> The admonition that even weak or contradicted evidence may form the basis of a self-defense instruction does not mean that a trial court must parse the defensive evidence to determine whether a complete confession may be inferred or implied. It simply means that the court should take all of the defensive evidence as credible and determine, on that assumption, whether a crime was admitted that was nevertheless justified. . . . I generally agree with the Court that it is not a trial court's prerogative to preempt the issue of self-defense merely because it thought the defendant's version was weak, contradicted, or not credible. *Gamino*, 537 S.W.3d at 514-15 (Keasler, J., dissenting) (footnotes omitted).

[1] To the extent the State maintains testimony from a defendant is required to raise the issue of self-defense, that argument is in conflict with *Smith v. State*, 676 S.W.2d 584, 586–571 (Tex. Crim. App. 1984) (holding self-defense may be raised by the testimony of witnesses other than the defendant).

Ebikam relies on the lenient standard that a defendant is entitled to a jury instruction on self-defense if the issue of self-defense is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. Contrary to the opinion by the court of appeals in this case, both this court and various courts of appeals have held a defendant is not required to concede the State's version of the events, as contained in the charging instrument, in order to be entitled to a self-defense instruction.

Gamino is not an outlier as characterized by the State. Its reasoning is sound and supported by the authority upon which it relies.

III. The court of appeals made this a "manner or means" case.

The State argues this is not a "manner or means" case (SPA's brief at 19). At the same time the State agrees the court of appeals was wrong to the extent it held Ebikam was required to admit the allegations of the charging instrument before he would be entitled to a charge on self-defense (SPA's brief at 21). The State generally agrees with the authority relied on by Ebikam recognizing that if a defendant acknowledges the existence of a physical altercation and having a role in that altercation will be sufficient to warrant a justification charge (SPA's brief at 23). However, it is argued Ebikam cannot benefit from the authority he relies on

because he did not admit to the charged conduct[2] or a different manner and means (SPA's brief at 23-24).

Ebikam maintains the argument is misdirected because it is based on viewing the evidence in the light least favorable to the requested charge. Under the correct standard of review, the evidence shows Ebikam tried to close the door and prevent Ebo from entering his apartment (3 RR 228). Ebo barged into the apartment and was both violent and aggressive (3 RR 229, 233). Ebikam was scared he was going to be hurt by Ebo (3 RR 229). When Ebikam attempted to call the police, Ebo took his cellphone and broke it (3 RR 229). Both Ebikam and the other woman in his apartment were scared when Ebo barged into his apartment (3 RR 230).

In describing his interaction with Ebo in the apartment, Ebikam stated:

> I tried to -- the only thing is I tried to stop her from coming into my house because I was scared what she was going to do to me or the lady inside my house. I tried to stop her and I told don't come into my house. She kept pushing (3 RR 231).

Ebikam did not understand why Ebo wanted to fight him (3 RR 232). He had a confrontation with Ebo when she was barging into his apartment (3 RR 257).

[2] The State claims the information alleges Ebikam struck Ebo in the face with his hand (SPA's brief at 24). It doesn't. The information simply alleges Ebikam struck Ebo with his hand (CR 8).

Ebikam's testimony, set out above, supported his requested charge on self-defense. He acknowledged the existence of an altercation and having a role in the altercation. The fact that in other parts of his testimony he denied striking Ebo with his hand did not disentitle him to the requested charge. *See Gamino*, 537 S.W.3d at 510 (holding a defendant is entitled to a jury instruction on self-defense if the issue of self-defense is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense).

The State argues that in view of Ebikam's denial of striking Ebo with his hand, no rational jury could have accepted the justification of self-defense (SPA's brief at 25-27). Ebikam maintains the argument is misdirected because it is based on viewing the evidence in the light least favorable to the requested charge. Under the correct standard of review the self-defense charge should have given and a rational jury acquitted based on the justification. *See Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007) (holding the requirement that the evidence must rationally support a jury finding before a defensive instruction is required serves to preserve the integrity of the jury as the factfinder by ensuring that it is instructed as to a defense only when, given the evidence, that defense is a rational alternative to the defendant's criminal liability).

Prayer

Ebikam prays the court will reverse the judgment of the court of appeals and remand the cause to the court of appeals for a harm analysis of the jury charge error.

Respectfully submitted,

/s/Richard E. Wetzel
Richard E. Wetzel
Bar No. 21236300

1411 West Avenue, Suite 100
Austin, Texas 78701

(512) 469-7943
(512) 474-5594 – fax
wetzel_law@1411west.com

Attorney for Appellant
Obinna Ebikam

Certificate of Compliance

This pleading complies with TEX. R. APP. P. 9.4. According to the word count function of the computer program used to prepare the document, the document contains 1,535 words excluding the items not to be included within the word count limit.

/s/ Richard E. Wetzel
Richard E. Wetzel
State Bar No. 21236300

Certificate of Service

This is to certify a true and correct copy of this pleading was sent by email to Counsel for the State of Texas, John Messinger, Assistant State Prosecuting Attorney, at his email address of information@spa.texas.gov on this the 29th day of June, 2019.

/s/Richard E. Wetzel
Richard E. Wetzel
State Bar No. 21236300